FILED
AUG 30 1982
ALEXANDER L. STEVAS

No. 82-49

In The

Supreme Court of the United States

OCTOBER TERM, 1982

MARGARET R. BROWN, et al.
Appellants,
v.
THYRA THOMSON, as Secretary of the State of Wyoming
et al, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

MOTION TO AFFIRM

August 24, 1982

STEVEN F. FREUDENTHAL
Attorney General
State of Wyoming

PETER J. MULVANEY
Deputy Attorney General
State of Wyoming
(Counsel of Record)

RANDALL T. COX
Assistant Attorney General
State of Wyoming

ATTORNEYS FOR APPELLEES

123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

QUESTION PRESENTED

Does the 1981 apportionment of the Wyoming House of Representatives apportioning, inter alia, one seat to the residents and voters of Niobrara County create invidious discrimination against the Appellants and other residents of Wyoming in violation of the Fourteenth Amendment to the Constitution of the United States?

PARTIES TO THE PROCEEDINGS

Additional defendants in the district court were:

Ed Herschler, Thyra Thomson, Shirley Wittler and James B. Griffith, as members of the State Canvassing Board, and Ed Herschler, as Governor of the State of Wyoming.

Intervening Defendants in the district court were:

James L. Thompson, Gerald D. Bardo, Russell Thompson, Kenneth A. Gropp, Richard G. Pfister, Peter M. Hansen, Gertrude Chamberlain, Betty Percival, Mary L. Burke, Board of County Commissioners of the County of Niobrara, Kenneth R. Freeman, as a County Commissioner of the County of Niobrara and in his individual capacity, F. Everett Brooks, as a County Commissioner of the County of Niobrara and in his individual capacity, and Louis L. Landkamer, as a County Commissioner of the County of Niobrara and in his individual capacity.

TABLE OF CONTENTS

	Page
Table of Cases and Other Authorities	iii
Opinion Below	1
Statement	2
Argument	4
THE QUESTIONS PRESENTED ARE INSUBSTANTIAL	
A. APPELLANTS (PLAINTIFFS) DID NOT PROVE INVIDIOUS DISCRIMINATION	4
1. Introduction	
2. Vote Dilution is De Minimis	
3. Representation is Proportionate to Population	
4. The Relief Sought is Trivial	
B. THE APPORTIONMENT WILL MAINTAIN AN EFFICIENT RELATIONSHIP BETWEEN LOCAL AND STATE GOVERNMENT	8
Conclusion	11

TABLE OF CASES AND OTHER AUTHORITIES

Page

CASES

Brown v. Thomson,
536 F.Supp. 780 (D. Wyo. 1982) 1,4,5,7,9

Davis v. Mann,
377 U.S. 678, 688-689 (1964)..... 6

Harrison v. Schaefer,
383 U.S. 269 (1966) 4,6

Lucas v. 44th Gen'l Assembly of Colorado,
377 U.S. 713, 727-730 (1964)..... 6

Mahan v. Howell,
410 U.S. 315 (1973) 10

Reynolds v. Sims,
377 U.S. 533, 547, 565 (1964) 6,10

Roman v. Sincock,
377 U.S. 695, 707-708 (1964)..... 6

Schaefer v. Thomson,
251 F.Supp. 450 (D. Wyo. 1965) 4,6

Thompson v. Thomson,
344 F.Supp. 1378 (D. Wyo. 1972)..... 6

White v. Regester,
412 U.S. 755, 764 (1973)..... 8

WMCA v. Lomenzo,
377 U.S. 633, 647-648 (1964)..... 6

OTHER AUTHORITY

Annot., *Apportionment-Constitutionality,*
12 L.Ed.2d 1282, 1289 (1964)..... 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-65

MARGARET R. BROWN, et. al,
Appellants,
v.
THYRA THOMSON, as Secretary of the
State of Wyoming, et. al,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

MOTION OF APPELLEES THYRA THOMSON, ED HERSCHLER, SHIRLEY WITTLER AND JAMES B. GRIFFITH TO AFFIRM

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, respectfully move that the order and decision of the district court be affirmed on the ground that the question is so insubstantial as not to warrant further argument.

OPINION BELOW

The opinion of the district court is reported at 536 F.Supp 780 (1982).

STATEMENT

Appellants challenge the 1981 Wyoming House reapportionment as being repugnant to the Fourteenth Amendment. The case involves political questions. There were disagreements among legislators as to the reapportionment of Wyoming's legislature following the 1980 census. Such disagreements are, of course, common and natural events. One disagreement during reapportionment debates centered upon whether Niobrara County in eastern Wyoming should elect one of 64 representatives or should be joined with another county; Niobrara County was apportioned a representative. Following the Governor's signing of a reapportionment bill in 1981, seven Wyoming voters brought this action. These voters did not claim standing as members of any discrete and insular minority; rather, they claimed standing as seven out of 192,510 registered voters from all Wyoming counties except Niobrara County. The plaintiffs urged that they have been invidiously discriminated against by the apportionment of one representative to Niobrara County.

By official census results, Wyoming's 1980 population was 469,557, and Niobrara County's population was 2,924. Niobrara County, one of 23 Wyoming counties, is rural, economically depressed and its population is isolated from its neighbors by a large expanse of open prairie.

Niobrara County has been representated by one member of the Wyoming House of Representatives at all times since the county was created in 1913. The county has shared one senator with larger Converse County since 1965. In 1981, the Wyoming legislature reapportioned both of its houses in accordance with changes in population distribution as shown in the 1980 census. Niobrara County was combined with Goshen County, its neighbor to the south, to form one Senate district. One Representative was apportioned to Niobrara County, and 63 representatives were apportioned among the residents of the remaining 22 counties.

The legislature reapportioned both the Senate and the House on the basis of population. Niobrara County's population remained constant between the 1970 and 1980 census while the population of most Wyoming counties increased. The legislature, aware of this fact, considered several alternatives to assure meaningful representation of the residents of all counties, including Niobrara County, in the House of Representatives. The legislature determined that a population formula should be used for apportionment of 63 representatives to 22 counties. It was further determined that even though Niobrara County contained fewer people, as measured by the census, than any other county, the county's residents should nonetheless be guaranteed an effective voice in the Wyoming House. Niobrara County's residents were therefore apportioned a single representative through a modification of the population formula.

Appellants complained to the district court that this legislative judgment works an invidious discrimination against them, and that the preservation of Niobrara County's representation dilutes their votes to an unconstitutional degree.

The district court heard the plaintiffs' complaints during a two-day hearing in March, 1982. The court found that the injuries complained of by the plaintiffs are de minimis. The court found a rational basis for Wyoming's apportionment and further found that the plaintiffs did not prove a prima facie case of discrimination. No evidence offered by the plaintiffs was excluded. The complaint was heard and dismissed.

ARGUMENT

THE QUESTIONS PRESENTED ARE INSUBSTANTIAL

A. APPELLANTS (PLAINTIFFS) DID NOT PROVE INVIDIOUS DISCRIMINATION

1. Introduction

Appellants complained in the district court that apportionment of a representative to Niobrara County will discriminate against them as voters and residents. Appellants were unable to show the court that this "discrimination" is in any manner significant. The testimony before the court revealed the discriminatory effect to be theoretical and insubstantial.

The court reviewed comprehensive statistical analyses of Wyoming's apportionment of representation. Several important conclusions were revealed. It was shown by uncontroverted evidence that no substantive changes in apportionment of the House have occurred since the 1960's. This is important because some 1,800 Wyoming residents participated in a challenge to Wyoming's Senate and House apportionments in 1964. The U.S. District Court for Wyoming revised the Senate apportionment and approved the House apportionment in 1965. *Schaefer v. Thomson,* 251 F.Supp. 450 (1965).

This decision was affirmed by the U.S. Supreme Court, *Harrison v. Schaefer,* 383 U.S. 269 (1966). The district court found in 1982 that no substantial changes in the House apportionment have occurred since the Supreme Court's affirmance in 1965. *Brown v. Thomson,* 536 F.Supp. 780 (D. Wyo. 1982).

2. Vote Dilution is De Minimis.

The district court found that the preservation of Niobrara County's representative in 1982 and thereafter would not cause any significant dilution of the voting power of any of the appellants. *Brown v. Thomson, supra* at 783. Stipulated exhibits show that the percentage of registered voters within the counties in which each of the appellants resides correlates closely with the percentage of House seats apportioned to each of those counties.

County	Percentage of Voters	Percentage of Seats
Albany	6.47	6.25
Campbell	4.27	4.69
Carbon	4.26	4.69
Fremont	7.49	7.81
Laramie	15.52	14.06
Sheridan	5.91	4.69
Teton	3.03	1.56
TOTALS	46.95	43.75

(From Ex. A-602, *Brown v. Thomson*)

The same principle holds true with respect to population figures. 46.3 per cent of Wyoming's population resides in these seven counties which will elect 43.75 per cent of the representatives. As the district court observed, there is nothing unfair nor invidious about the distribution of political influence.

3. Representation is Proportionate to Population.

Another statistical approach examined by the district court shows that the plan approved by the court does not constitute a substantial departure from principles stated repeatedly by this Court.

Many reapportionment plans have been disapproved by federal courts because they would have allowed a minority of residents to dominate the

legislative process. For example, the Wyoming Senate apportionment of 1963 would have allowed 24 per cent of the population to elect a majority of the Senate. Clearly such a malapportionment fosters invidious discrimination. This Court has stricken plans allowing election of a legislative majority by 19 per cent, *Reynolds v. Sims*, 377 U.S. 533, 547, 565; 22 per cent, *Roman v. Sincock*, 377 U.S. 695, 707-708, 35 per cent, *WMCA v. Lomenzo*, 377 U.S. 633, 647-648; 33 per cent, *Lucas v. 44th Gen'l Assembly of Colorado*, 377 U.S. 713, 727-730 and 41 per cent, *Davis v. Mann*, 377 U.S. 678, 688-689. Other federal courts have followed this principle. See Annot., *Apportionment-Constitutionality*. 12 L.Ed.2d 1282, 1289 (1964).

This method of analysis, often referred to as a test of "the minimum population electing a majority," requires a selection of the most over-represented districts so as to yield a worst-case sample. Stipulated exhibits in the record show that the Wyoming District Court has previously approved Wyoming plans allowing election of a majority (53 per cent) of the Senate by 47 per cent of the population, *Schaefer v. Thomson, supra*, and 49.7 per cent electing 56 per cent of the Senate, *Thompson v. Thomson*, 344 F.Supp. 1378 (D. Wyo. 1972). Similarly the court approved election of 51 per cent of the House by 46.5 per cent of the population, *Schaefer v. Thomson, supra*, and election of 52 per cent by 47 per cent, *Thompson v. Thomson, supra*.

The current House apportionment scheme could allow, in theory, 46.65 per cent of the population to elect 51.56 per cent of the representatives. See Exhibits A-501 through 510. Of course this worst-case sampling method presents a deliberately jaundiced perspective, but its usefulness lies in its measure of the maximum possible erosion of majority process for comparative purposes. The 1982 apportionment is not different from Wyoming apportionments approved by the courts in *Schaefer v. Thomson, Harrison v. Schaefer* and *Thompson v. Thomson, supra*. It is readily apparent that the apportion-

ment of a representative to Niobrara County does not cause or contribute to an unfair distribution of political influence.

4. The Relief Sought is Trivial.

The clearest indicia of the de minimis impact of the challenged apportionment are reflected in the nature of the relief sought by appellants. It has been proposed that Niobrara County be joined with Goshen County to form a representative district. If this were to occur, the number of members of the House would be reduced by one, to a total of 63. New statistical analyses of population and voter numbers using these assumptions were submitted to the district court. These results emerged:

	64 members with one from Niobrara County	63 members with none from Niobrara County
Minimum population which could elect a majority of the House	46.65% (majority of 64 seats)	46.65% (majority of 63 seats)
Per cent of members elected from appellants' respective districts	43.75% (28 of 64)	44.40% (28 of 63)

The district court found these changes to be trivial. The court observed that ". . . such minor improvement hardly reaches the level of significance." *Brown v. Thomson, supra,* at 783.

It is worthwhile to compare appellants' complaints about the treatment given Niobrara County with the scope of most reapportionment challenges. Usually, apportionment suits are brought to redistribute political influence throughout a whole jurisdiction (state, city or district). Plaintiffs generally complain of some significant loss of voting power, or discrimination against economic, racial, geographic or political entities. Such is not the case here. No statewide reallocation of political

influence is prayed for. No discrimination against a group of voters, or a voting district, is shown in the record. The facet of Wyoming's 1981 reapportionment that is challenged by appellants involves a minor adjustment in the plan to accommodate an isolated rural county. The district court's approval of this adjustment is unlikely to be construed by anyone to be a reversal in current apportionment law as contended by appellants.

In support of his conclusion that the appellants showed no significant injury, Circuit Judge Doyle quoted *White v. Regester*, 412 U.S. 735 at 764:

> We do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation.

In summary, appellants did not prove that their votes have been diluted, that their rights of full and fair political representation have been compromised or that they have suffered unfair or invidious discrimination. Appellants offered no evidence of intent to discriminate, nor of a discriminatory pattern, impact or effect. There is no discrimination against a discrete and insular minority. Appellants simply did not and could not prove a prima facie case.

B. THE APPORTIONMENT WILL MAINTAIN AN EFFICIENT RELATIONSHIP BETWEEN LOCAL AND STATE GOVERNMENT.

The district court found that appellants did not show invidious discrimination. However, the court heard evidence regarding state policies underlying the legislature's decisions prior to taking the case under advisement. The court noted that even if a prima facie case of discrimination were found in the record, the state's

reasons for providing a representative to Niobrara County's residents were valid and sufficient to overcome such a finding. *Brown v. Thomson, supra.*

The facts are unique. Niobrara County, although far from being large by Wyoming standards, encompasses 2,614 square miles, larger than the states of Delaware (1,982 square miles) and Rhode Island (1,049 square miles). Wyoming contains a population of about 470,000 people in an area of 97,914 square miles, with a density of 4.8 persons per square mile. Distances between communities are great. Communication is expensive and travel is time-consuming. The district court observed that "Wyoming as a state is unique among her sister states. A small population is encompassed by a large area." *Brown v. Thomson, supra,* at 784. "[Wyoming's] problems are different from those which are present in almost every other state in the union. Geographically it is large, but population-wise, it is relatively small, although it is growing." *Id.* at 788.

As has been shown, the deviation in this case is de minimis. The effect upon appellants is trivial. But the benefit to the residents of Niobrara County cannot be measured in statistics. The district court found that:

> In Wyoming, the counties are the primary administrative agencies of the State government. It has historically been the policy of the State that counties remain in this position.
>
> The people within each county have many interests in common such as public facilities, government administration, and work and personal problems. Under the facts of this action, to deny these people their own representative borders on abridging their right to be represented in the determination of their futures.

Brown v. Thomson, supra at 784.

The district court's decision, upholding a basic legislative judgment, is not inconsistent with this Court's holdings in *Reynolds* and *Mahan v. Howell*, 410 U.S. 315, that historic and functional political subdivision boundaries may be relied upon in legislative apportionment. Appellants contend that this decision constitutes a reversal in the law, which may "spawn a substantial regeneration of apportionment litigation." These contentions greatly exaggerate the significance of this case.

Because of great distance and cost factors Wyoming relies heavily upon local governments to bear the burdens of providing most public services. Counties provide the basic unit of government in Wyoming. The Wyoming Constitution charges county government with many important and expensive public duties. Concomitantly, the Constitution severely limits the taxing powers of counties. Revenue shortfalls for county and school district purposes are made up by a complex array of legislative taxing and revenue distribution programs. Without the direct assistance of the state legislature, local governments would be forced to abandon their constitutional duties. Thus Wyoming has chosen, as a matter of practical necessity, to preserve representation of its population by use of county representative districts. The maintenance of historic state policy in a state with unique geographic problems is permissible in the absence of invidious discrimination. See *Reynolds v. Sims, supra*, at 578, 579.

Although the facts are unique, the law is not. This Court has repeatedly observed that limited deviations from mathematically perfect legislative apportionment may be imposed to preserve the integrity of political subdivisions. *Reynolds v. Sims, supra*, at 578, 580; *Mahan v. Howell, supra*, at 322-326.

CONCLUSION

Appellees submit that the district court's analysis of the complaint is correct. There is no invidious discrimination against appellants and there is no evidence of injury to appellants. There is no discrimination against a discrete and insular minority. Wyoming's House apportionment plan has not changed, excepting minor adjustment, since it was found constitutional in 1965 and again in 1972. The district court's dismissal was proper and appropriate.

Wherefore, appellees respectfully submit that the questions raised by appellants are so insubstantial as not to need further argument, and appellees respectfully move this Court to affirm the order of dismissal entered in this cause by the United States District Court for the District of Wyoming.

Dated this 24th day of August, 1982.

Respectfully submitted,

Steven F. Freudenthal
Attorney General

Peter J. Mulvaney
Deputy Attorney General
(Counsel of Record)

Randall T. Cox
Assistant Attorney General

ATTORNEYS FOR APPELLEES

123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841